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Supreme Court of the United States

October Term, 1977

No. 77-39

WILLIAM PINKUS, doing business as "ROSSLYN NEWS COMPANY" and "KAMERA",

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provision and Statutes

Other

Supreme Court of the United States

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CITATION TO OPINION BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported as *United States v. Pinkus*, 551 F.2d 1155 (9th Cir. 1977), and is set forth in the Appendix to the Petition for Certiorari, p. 2a.

No opinion was delivered by the District Court.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals (Pet. App. 2a) was entered on April 7, 1977. A petition for rehearing with a suggestion for rehearing *en banc* was denied on June 6, 1977 (Pet. App. 1a).

The petition for a writ of certiorari was filed on July 6, 1977, and was granted on October 31, 1977 (App. 66).

The jurisdiction of this Court rests on 28 U.S.C., Section 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

United States Constitution, Amendment I:

"Congress shall make no law . . . abridging the freedom of speech, or of the press. . . ."

The relevant statutory provision is Title 18, U.S.C., Section 1461 and is set out in the Appendix to this brief, *infra*, p. 55.

THE QUESTIONS PRESENTED FOR REVIEW

I.

In a federal prosecution for mailing allegedly obscene materials, where it was stipulated that the materials were not mailed to children and that children were not involved in the case, did the District Court's jury instruction that children were to be considered as part of the community whose standards were to be applied in determining whether the materials were obscene contravene the First Amendment and constitute reversible error?

II.

In a federal prosecution for mailing allegedly obscene materials, where there was no evidence that the materials were mailed to especially sensitive persons, did the District Court's jury instruction that sensitive persons were included in the community whose standards were to be applied in determining whether the materials were obscene contravene the First Amendment and constitute reversible error?

III.

In a federal prosecution for mailing allegedly obscene materials, where the Court of Appeals, in reviewing petitioner's conviction, determined that two motion pictures offered as comparison evidence and excluded by the District Court bore a reasonable resemblance to the motion picture film which was the subject of one of several counts of the indictment, and where the record demonstrated massive public acceptance of the two films, (i) did the Court of Appeals err in refusing to review the exclusion of the comparison evidence in reliance upon the concurrent sentence doctrine; and (ii) where the defense adduced uncontradicted evidence that two motion pictures had received massive public acceptance within the community, and offered proof that these two films were comparable to the allegedly obscene materials, did the refusal of the District Court to permit the jury to review the films constitute reversible error?

IV.

In a federal prosecution for mailing allegedly obscene materials, where the record contained no evidence that the material was designed for or disseminated to any clearly defined deviant group, (i) did the District Court err in instructing the jury that it could consider the appeal of the material to the prurient interest of members of a deviant sexual group, and (ii) did the District Court err in instructing the jury that it could consider the appeal of such material to members of a deviant group without

finding that the material was "designed for and primarily disseminated to a clearly defined deviant sexual group?"

V.

In a federal prosecution for mailing allegedly obscene materials, where there was no evidence as to the setting in which the materials were presented, or their manner of distribution, circumstances of production, sale or advertising, except the allegedly obscene advertisements and brochures themselves and the occupations of the recipients, did the Court below err (i) in instructing the jury that it could consider pandering in determining whether the materials were obscene, and (ii) in specifically instructing the jury that it could consider the setting in which the materials were presented including their manner of distribution, circumstances of production, sale or advertising?

STATEMENT OF THE CASE

On November 6, 1972, petitioner William Pinkus was indicted in the United States District Court for the Central District of California on eleven counts of mailing obscene material and advertisements in violation of 18 U.S.C. §1461.[1]

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1. App. 1a. The record in the Court of Appeals below consisted of transcripts of the clerk's record and the reporter's record. References to the transcript of the clerk's record are herein designated by the prefix "C.T.", and references to the reporter's transcript are designated by the prefix "R.T."

Counts I, IV, V, VI, VII, IX, X and XI charged petitioner with mailing obscene brochures advertising films, books and magazines (and, in case of Count X, playing cards). Counts II, III and VIII charged him with mailing information where obscene material could be obtained. In addition, Count VII alleged the mailing of an obscene magazine and Count IX alleged the mailing of an obscene film. The dates of the alleged offenses ranged from July 28, 1971, to June 19, 1972.

A jury trial held in July of 1973 resulted in petitioner's conviction which was reversed by the Court of Appeals for the Ninth Circuit on or about February 5, 1975.[2] The reversal of the prior conviction under this indictment was based upon the fact that the jury had been instructed under the expanded concept of obscenity announced in *Miller v. California,* 413 U.S. 15 (1973), although the alleged offenses occurred prior to that decision so that the more stringent *Roth-Memoirs* definition of obscenity was applicable. *Cf. Marks v. United States,* ..... U.S. ....., 97 S. Ct. 990 (1977).

Petitioner was retried before the same trial judge, generally in January of 1976, under *Roth-Memoirs* precepts, a jury verdict of guilty on all eleven counts was returned on January 12, 1976. On February 9, 1976, the Court sentenced William Pinkus to imprisonment for four years on each count, sentences to run concurrently (App. 8). The Court also initially fined him an aggregate total of $11,000 (*ibid.*), but upon noting that this fine was greater than that imposed following the first trial, the Court reduced the fine to $5,500 by entry dated March 1, 1976 (App. 10).

Appellant perfected an appeal from the District Court's judgment and sentence to the Court of Appeals for the Ninth Circuit, which affirmed the judgment.

FACTS

The Government's Case-in-Chief

The Government's case-in-chief consisted solely of the introduction of the allegedly obscene brochures and adver-

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2. *United States v. Pinkus,* No. 73-2900 (9th Cir. 1975).

tised or mailed materials (Government's Exhs. 1-11; R.T. 146) and the reading of a stipulation that the materials were voluntarily and intentionally mailed by the petitioner with knowledge of the content and with the intention that the mailed materials be for the personal use of the recipient (App. 13-18).

At the close of the government's case, the government acknowledged that certain materials were presented as appealing to deviant groups (App. 19). The defense called the attention of the Court to the lack of any independent evidence as to the deviant character of the materials (*Ibid.*), and moved for acquittal (R.T. 155-156; C.T. 177-180). The motion was overruled (R.T. 164).

The Defense Case

The defense case consisted of expert and survey evidence tending to prove that the materials did not appeal to prurient interest, did not exceed community standards and had redeeming value. A survey of sexual attitudes was, in part, admitted (R.T. 218-258; 304-432; 469-513; Deft. Exhs. G, H & I; R.T. 439, 440, 442, 535).

In support of the community acceptance of comparable materials, the defense called Whitney Williams, a representative of the entertainment newspaper, *Daily Variety*, who presented box office statistics for the popular films "Deep Throat" and "The Devil in Miss Jones" in the Los Angeles area (App. 21-26), indicating that at $5.00 per admission, "Deep Throat" grossed $2,672,476 during 1973 (App. 25-26; Deft. Exh. D; R.T. 295, 304) and additional large sums in 1974 (App. 25), that "The Devil in Miss Jones" grossed $1,209,180 during 37 weeks in 1973-1974 (App. 27; Deft. Exh. E; R.T. 297, 304), and that these sexually explicit films were rated first and third on the list of the ten highest grossing films of the year in Los

Angeles (App. 27). At the $5.00 admission price, more than one-half million people attended exhibitions of "Deep Throat" in Los Angeles during 1973 alone, while more than 240,000 people purchased tickets for "The Devil in Miss Jones".

Although the trial judge had permitted the jury to hear these statistics concerning the public acceptance of "Deep Throat" and "The Devil in Miss Jones", he refused to allow the jury to see these motion pictures. Repeatedly during the trial, the defense offered to exhibit these two films to the jury either in a theater (App. 31) or in the courtroom (App. 31), both for the benefit of the court and the jury on the issue of obscenity *vel non* and as comparison materials on the issue of contemporary community standards (R.T. 691).[3] The trial judge refused to permit these films to be admitted (R.T. 539, App. 30; 41-42) because he had viewed "part" of "Deep Throat" and felt "that it would not be proper for the films that have been offered to be shown to the jury." The basis of this conclusion is not explained further in the record.

The trial judge acknowledged that:

> ". . . in no way does [this case] involve any distribution of material of any kind to children, and that the evidence will, that there will be a stipulation even that there has been no exposure of any of this evidence to children." (App. 12).

Nevertheless, the trial judge permitted cross-examination of a defense witness on the effects of obscenity on children (R.T. 396-97).

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3. Defense Exhibits K, L, M, N and O (R.T. 538-539; App. 30).

Government Rebuttal

After the defense rested, over objections the Government called a rebuttal witness, Dr. James Rue. Dr. Rue was a family counsellor with minimal qualifications in sexual matters, whose doctorate was in telecommunications (R.T. 557-558; 569-570). Over objection, Dr. Rue mentioned contact with "deviant sexual groupings" in his practice (R.T. 552) and was allowed to testify that certain aspects of the materials had appeal to "the average person in the community as well as sexually deviant groups" (App. 40-41).

This witness never did testify as to the effect of specific material on particular well-defined deviant groups, and there is utterly no evidence in the record that the material was designed for or distributed to the members of any deviant group. Dr. Rue's testimony on the subject of deviance was merely that the diverse materials as a whole appealed to the prurient interest of the average person (App. 41) and, also, the prurient interest of a member of an unspecified sexually deviant group (App. 41).

Over objection, the Court also permitted Dr. Rue to testify as to the adverse effect of obscene materials on the "young person" (App. 38).

In direct examination, Dr. Rue was asked whether he had any experience which would illustrate the effect on the viewer of viewing similar material. He replied that in a case "he was currently dealing with, the father had molested his own daughter after having come from an adult book store. . . ." (App. 38). Petitioner immediately moved to strike and moved for a mistrial, but the motions were denied (App. 38).

The Jury Charge

Notwithstanding the stipulation that children were not involved in this case, the trial court refused to instruct the jury that the defendant was not charged "with having violated any law with regard to minor children" or that the jury should not "assume from the fact that there might have been testimony concerning minor children that the defendant is in any way associated with any issue concerning children." (C.T. 191; R.T. 661-662). The judge refused all instructions tendered by petitioner which would have defined community standards in terms of what is accepted by the "average adult person" (C.T. 215; R.T. 672; R.T. 678).

Instead of excluding consideration of the special sensibilities of minors, the trial judge expressly adopted an instruction requested by the Government (C.T. 243) and charged the jury that:

> "In determining community standards, you are to consider the community as a whole, young and old, educated and uneducated, the religious and the irreligious, men women and *children*, from all walks of life." (App. 58) (Emphasis added).

The District Court also charged the jury that in determining the hypothetical average standard in the community, the jury must include the "sensitive", as well as the "insensitive"; that "in other words, you must include everyone in the community." (App. 57).

Despite the lack of sufficient testimony concerning the existence of any well-defined deviant group or groups for whom the material was designed or to whom it was distributed, the Court instructed the jury (over objection), that it must gauge whether the material when "considered

in relation to the intended and probable recipients constituted an appeal to the prurient interest of the average person . . . or the prurient interest of members of a deviant sexual group" (App. 57) and that in applying the prurient interest test it must consider "how the picture would have impressed the average person, or a member of a deviant sexual group. . . ." (App. 57).

The Court also instructed the jury at length, over objection, on pandering (App. 59-60). The charge, in part, instructed the jury that in determining the obscenity of the materials, it could "consider the setting in which they are presented." (App. 60).

> "Examples of what you may consider in this regard are such things as: manner of distribution, circumstances of production, sale and advertising." (*Ibid.*).

Except for the brochures themselves, there was not a scintilla of evidence on any of these subjects.

SUMMARY OF ARGUMENT

1. In this federal prosecution in which the petitioner was charged with eleven counts of violating Title 18 U.S.C. Section 1461, the trial court erred in its charge to the jury by instructing it that in determining whether the materials in issue were obscene it was to include children in its composition of the community whose standards were to be applied, contrary to the teachings of this Court's decision in *Roth v. The United States,* 354 U.S. 476 (1957), which decision expressly rejected the concept of obscenity first announced in *Regina v. Hicklin* [1868], L.R. 3 Q.B. 360. Petitioner's requested charge that would have instructed the jury to exclude children from its consideration of the composition of the community was refused. By instructing the jury to view the material based on a community standard which necessarily included the effect of the material in issue upon "children" rather than the "average person" or "reasonable person," the trial court subverted the formula for determining obscenity established by this Court. *Hamling v. United States,* 418 U.S. 87 (1974).

Moreover, the trial court also instructed the jury to include "everyone" in the community, including "insensitive" and "sensitive" persons in determining the average person in the community. This portion of the trial court's instruction to the jury was likewise erroneous and contrary to this Court's decisions in *Roth* and *Miller,* which require that the jury be instructed to *ignore* and *exclude* the sensibilities of the most susceptible members of the community. The deficiencies in the objectionable portions of the charge were not cured by any other instructions contained in the charge.

2. Petitioner offered to introduce two films for comparison purposes, whose wide community acceptance was clearly established and whose similarity to the materials in issue was conceded by the court below. The evidence was refused by the trial court. The court below declined to review petitioner's assignment of error on the refused admission of the films as it applied to a single count involving film by applying the concurrent sentence doctrine of *Benton v. Maryland,* 395 U.S. 784 (1969), in which the doctrine was held not to be a jurisdictional bar to review. The court below erred in applying the concurrent sentence doctrine in the circumstances of this case for the reason that there were adverse collateral consequences flowing from the trial court's refusal to admit the offered films.

The trial court's refusal to admit the films should have been accorded appellate review independent of the concurrent sentence doctrine for the reason that the explicit sexual activity depicted in the offered films was identical to the sexual activity depicted in the still photographs contained in the materials introduced in evidence to support the prosecution's charges as to the other ten remaining counts of the indictment. The prosecution did not sustain its burden to prove beyond a reasonable doubt that the refusal of the trial court to admit the films as to all counts was not prejudicial to petitioner. *Fahy v. Connecticut*, 375 U.S. 85 (1963), and *Chapman v. California*, 386 U.S. 18 (1967).

The trial court erred in refusing admission of the offered films as comparables where the similarity of the material offered as comparables to the material charged was clear and so found by the court below, community acceptance of the offered films was proved without dispute, and the foundation for the admission of the material was properly laid. In such circumstance, the jury was forced to speculate as to the content of the films whose widespread acceptance had been attested to by a defense witness.

3. There was not sufficient evidence in the record to warrant the trial court's charge to the jury on prurient appeal of the material in issue to members of a deviant sexual group. *Mishkin v. New York*, 383 U.S. 501 (1966), and *Hamling v. United States*, 418 U.S. 87 (1974). In the absence of evidence showing that the material was designed for and disseminated to a particularly defined deviant group, the instruction on appeal to deviant groups should not have been given. The prosecution should be required to introduce evidence for the jury's use in determining whether certain materials appeal to the prurient

interest of members of a deviant group. *United States v. Klaw*, 350 F.2d 155 (1965), and see *Paris Adult Theater I v. Slaton*, 413 U.S. 49, 56, fn. 6 (1973).

The trial court's charge on the materials' appeal to members of deviant groups also should have instructed the jury to find whether the materials had been designed for and primarily disseminated to a clearly defined deviant sexual group prior to determining whether such materials in fact appealed to the prurient interest of the members of such group.

4. The trial court erred in instructing the jury that it could consider pandering as an adjunct to the test to be applied in determining whether the materials in issue were obscene, where the only evidence offered by the prosecution to prove the charges against petitioner consisted of the materials themselves and a stipulation that the materials had been mailed to certain identified adult individuals whose occupations were stated. *Ginzburg v. United States*, 383 U.S. 463 (1966). The record contains no evidence showing petitioner's methods of operation, the scope or manner of distribution of the materials or the economic factors attendant to the marketing of the materials. *Ginzburg v. United States, supra; Mishkin v. New York, supra*; and *Hamling v. United States, supra*. The trial court's charge on pandering enabled the prosecutor to disproportionately augment any evidence which may have appeared in the record with respect to pandering. Inasmuch as the jury itself requested that the charge on pandering be reread to it, the prejudicial effect of this portion of the charge is clear. The prosecution's burden of proving lack of prejudice as required by *Fahy v. Connecticut, supra*, and *Chapman v. California, supra*, has not been met.

The pandering charge was also erroneous in that the trial court instructed the jury that it could consider the "setting" in which the materials were presented, including "manner of distribution, circumstances of production, sale and advertising". No evidence of the setting, manner of distribution or the other factors which the court instructed the jury to consider appear in the record. The jury was therefore instructed to consider matters not in evidence and thereby was permitted to make unwarranted assumptions of facts in reaching its verdict. *United States v. Breitling*, 20 How. 252, 61 U.S. 252 (1858).

ARGUMENT

I. THE COMPOSITION OF THE COMMUNITY WHOSE STANDARD IS TO BE APPLIED BY A JURY IN ITS DETERMINATION OF WHETHER THE MATERIALS IN ISSUE ARE OBSCENE SHOULD NOT INCLUDE CHILDREN AND SENSITIVE PERSONS.

A. Children Should Not Be Included in the Community.

The jury was instructed to determine whether the materials in issue were obscene by application of the definition of obscenity established in *Roth v. United States*, 354 U.S. 476 (1957) and *Memoirs v. Massachusetts*, 383 U.S. 413 (1966). The trial court instructed the jury that its determination was to be made on the basis of "how the average person of the community as a whole . . . would have viewed the material at the time it was mailed." (App. 58). The Court then instructed members of the jury as to what interests were to be considered by them in establishing the community standard to be applied:

> "In determining community standards, you are to consider the community as a whole, young and old, educated and uneducated, the religious and the irreligious, men, women and children, from all walks of life." (App. 58).

Petitioner had specifically requested the trial court to charge the jury that children were to be excluded from its consideration in its determination of the composition of the community (C.T. 191). The inclusion of children as a segment of the community whose interests were to be weighed in reaching a standard was insisted upon by both respondent and the trial court over repeated objection by petitioner (R.T. 641-42). The jury's authorization to include children in its standard was granted notwithstanding the fact that the trial court itself, in response to an inquiry from a juror at the outset of the trial, had advised the jury that it was stipulated that children had not been exposed to the materials which were to be judged by the jury (App. 12).

The inclusion of children by the trial court in its charge to the jury was assigned as error to the court below. Although that court did not approve, but rather disapproved, the challenged instruction, it failed to conclude that the instruction constituted error because it could find no authoritative precedent to sustain the claimed error:

> ". . . [W]e find no reversible error here, not because of the outcome in *Manarite*, but because of lack of authority against such an outcome. We do not imply that we approve this language. Rather, we feel that the specific inclusion of children is unnecessary in the definition of the community and prefer that chil-

dren be excluded from the court's instruction until the Supreme Court clearly indicates that inclusion is proper." *United States v. Pinkus*, 551 F.2d 1155, 1158.

The precise question as to whether a jury should be instructed to exclude children from the composite community in the determination of the standard to be applied in viewing allegedly obscene materials may well not have been previously addressed directly by this Court. However, consideration of the fundamental determinations made by this Court in the obscenity cases which it has decided in the past thirty years makes clear that children should not be included in the "community" if the First Amendment, against which all obscenity legislation and obscenity prosecutions are tested, is to retain its vitality.

The ancient test of obscenity was formulated in *Regina v. Hicklin* [1868], L.R. 3 Q.B. 360, in which Chief Justice Cockburn established the criteria which thereafter prevailed for almost a century:

> "I think the test of obscenity is this, whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences and into whose hands a publication of this sort may fall. Now, with regard to this work, it is quite certain that it would suggest to the minds of the young of either sex, or even to persons of advanced years, thoughts of a most impure and libidinous character." *Id.*, at 371.

The thrust of the English jurist's test of obscenity was emphasized by his stated concern that particularly susceptible persons would read the condemned book:

> "This book we are told, is circulated at the corners of streets and in all directions, and of course it falls into the hands of persons of all classes—young and old—and the minds of the hitherto pure are exposed to the danger of contamination and pollution from the impurity it contains." *Ibid.*

The concept of obscenity first announced in *Regina v. Hicklin* was absolutely repudiated in *Roth v. United States*, 354 U.S. 476 (1957), in which the Court stated:

> "The Hicklin test, *judging obscenity by the effect* of isolated passages *upon the most susceptible persons*, might well encompass material legitimately treating with sex, and so it *must be rejected as unconstitutionally restrictive of freedoms of speech and press*. *Id.*, 354 U.S. at 489. (Emphasis supplied).

Although *Roth* specifically rejected the notion that particularly vulnerable members of a community could set its obscenity standards, it has been suggested that because the charge of the trial court in *Roth* included children as part of the community whose standard was to apply, that case authorizes such a jury instruction. See *United States v. Manarite*, 448 F.2d 583, 592 (2nd Cir. 1971), *cert. denied*, 404 U.S. 947 (1971), and the opinion of the court below in the case at bar. 551 F.2d at 1158. A careful reading of *Roth* and its progeny leads ineluctably to the opposite conclusion. In *Roth*, the charge was not under review, nor was that issue raised or considered in the majority opinion. Chief Justice Warren, concurring in *Roth*, rejected the implication that children were included in the community whose standards defined obscenity; he specifically noted that whether particular material is obscene varies with "the part of the community

it reache[s]," *Id.*, 354 U.S. at 495,[4] and therefore urged that the decision itself be limited to the validity of the statutes in issue as applied to the facts in the case. Justice Harlan, concurring and dissenting in *Roth*, observed that the "correctness of the charge is not before us," the same having been subsumed in the question of the statute's validity, 354 U.S. at 507, fn. 8, and interpreted the majority to have excluded children from the "community". He stated:

> "I agree with the Court, of course, that the books must be judged as a whole and in relation to the normal adult reader." *Id.*, at 502.

In his concurrence in the decision of the Court of Appeals for the Second Circuit in *Roth*, Judge Frank approved the trial court's charge because in another part of the charge the trial court expressly instructed the jury not to consider the effect of the material on children. *United States v. Roth*, 237 F.2d 796, 801, fn. 1 (1957) (Frank, J., concurring), *aff'd*, 354 U.S. 476 (1957). No such additional language appears in the charge in this case. Judge Frank concluded that the correct test to be applied is the effect of the material on the "average, normal, adult persons. . . ." *Id.*, 237 F.2d at 801.

In addition, the statement of this Court in *Ginzburg v. United States*, 383 U.S. 463 (1966), dispels any notion that the Court's affirmance of the conviction in *Roth* constituted an approval of the trial court's jury charge:

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4. Consistent with the "variable" concept of obscenity he expressed in *Roth*, Chief Justice Warren, dissenting in *Jacobellis v. Ohio*, 378 U.S. 185, 201 (1964), stated:

> "A technical or legal treatise on pornography may well be inoffensive under most circumstances but, at the same time, 'obscene' in the extreme when sold or displayed to children." (Footnote omitted).

> *"We are not, however, to be understood as approving all aspects of the trial judge's exegesis of Roth, for example, his remarks that 'the community as a whole is the proper consideration.* In this community, our society, we have children of all ages, psychotics, feeble-minded and other susceptible elements. Just as they cannot set the pace for the average adult reader's taste, they cannot be overlooked as part of that community.' 224 F. Supp. at 137. Compare *Butler v. State of Michigan*, 352 U.S. 380, 77 S. Ct. 524, 1 L.Ed. 2d 412." *Id.*, 383 U.S. at 465, fn. 3. (Emphasis supplied).

Several months prior to the announcement of this Court's decision in *Roth*, the Court had occasion to review a Michigan statute which prohibited distribution to the general public of material which was found to have a deleterious influence on children. In striking down the statute, this Court held that:

> "We have before us legislation not reasonably restricted to the evil with which it is said to deal. *The incidence of this enactment is to reduce the adult population of Michigan to reading only what is fit for children.* It thereby arbitrarily curtails one of those liberties of the individual, now enshrined in the Due Process Clause of the Fourteenth Amendment, that history has attested as the indispensable conditions for the maintenance and progress of a free society." *Butler v. Michigan*, 352 U.S. 380, 383-384 (1957). (Emphasis supplied).

The court below attempted to distinguish the case at bar from *Butler* by noting that the statute effectively reduced the reading material available to adult residents of Michigan to the level of children, whereas the trial court's charge here merely required inclusion of the in-

terests of children as a part of the community whose standard was to be applied when viewing the materials. This is a distinction without a constitutional difference, for the vice inherent in any regulatory scheme which includes children as a part of the standard to be applied in determining whether materials are obscene is that adult rights to read or view materials at the outer limits of First Amendment protections are necessarily diluted by *any* consideration of the special susceptibility of children, particularly in a case such as this one, where the materials in issue were distributed only to adults.

The inclusion of children in the charge constitutes a regression, a century step backward to the rule announced in *Hicklin*[5] and denounced in *Roth*. We no longer look to the effect upon the most susceptible persons in the community to determine whether material is obscene. The thrust of *Roth* was to *exclude* most susceptible persons from controlling such a determination.

Moreover, the constitutional infirmity of the charge is compounded by the court's instruction to the jury that it must include not only children, but also other "sensitive persons" in the community whose standards effect the definition of obscenity. The trial court's instructions in this case necessarily prevent a jury determination of the "average person" or "reasonable person" whose standard this Court stated in *Hamling v. United States*, 418 U.S. 87, 104 (1974) and reaffirmed in *Smith v. United States*, ... U.S. ....., 45 U.S.L.W. 4495, 4498 (1977), was constitutionally appropriate for determining whether material is obscene.

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5. *Hicklin* itself appears to have been overruled in England, its source, as well as in the United States. See *Regina v. Martin Seeker Warburg, Ltd.* [1954], All Eng. 683, in which Justice Stable charged the jury that obscenity is not to be judged by the materials' effect on children or adolescents.

Petitioner therefore respectfully urges the Court to find that the trial court's instruction to the jury that it include children as a part of the community in determining the standard to be applied in reaching its verdict, together with its refusal to grant petitioner's requests to charge on the same subject, constituted reversible error.

B. "Sensitive Persons" Should Not Be Included in the Community.

In addition to including "children" as members of the relevant community whose standards were to be applied in assessing the obscenity of the materials (see discussion at pp. 14-21, *supra*), the district court charged the jury that:

> "Thus the brochures, magazines and film are not to be judged on the basis of your personal opinion. Nor are they to be judged by their effect on a particularly sensitive or insensitive person or group in the community. You are to judge these materials by the standard of the hypothetical average person in the community, but in determining this average standard *you must include the sensitive* and the insensitive, in other words, *you must include everyone* in the community." App. 57. (Emphasis supplied).

The court below approved the portion of the court's charge here urged as error upon a finding that the direction as to inclusion of "sensitive" and "insensitive" persons in the community "was merely an elaboration on the concept of the total community." 551 F.2d at 1157-1158. However, the determination of the court below that the total community concept allows an instruction which mandates the inclusion of sensitive persons in the community is at odds with the fundamental precepts for determination of obscenity established in *Roth*, and as specifically pro-

claimed by this Court in *Miller v. California*, 413 U.S. 15 (1973), that:

> ". . . the primary concern with requiring a jury to apply the standard of 'the average person, applying contemporary community standards' is to be certain that, so far as material is not aimed at a deviant group, *it will be judged by its impact on an average person, rather than a particularly* susceptible or *sensitive person*—or indeed a totally insensitive one." *Id.*, 413 U.S. at 33. (Emphasis added).

It is readily apparent that the purport of this language quoted from *Miller* is to *exclude* from the jury's consideration the sensibilities of the most and least sensitive persons. However, the thrust of the amplification of the "average man" concept contained in the trial judge's charge here is to require the jury to *include* the sensibilities of *"everyone"* in the community in its deliberations before calculating the average level of sensitivity. Although jurors may have some common-sense notion of what an "average" attitude in the community might be, they do not know "everyone in the community," and cannot be expected intelligently to apply an equation which requires them to arrive at the median by reference to "everyone". The practical effect of this instruction is to require the jury to consider and include that which *Miller* and *Roth* both required them to ignore and exclude—the sensibilities of the most susceptible members of the community. As this Court recently said:

> ". . . a principal concern in requiring that a judgment be made on the basis of 'contemporary community standards' is to assure that the material is judged neither on the basis of each juror's personal opinion, nor by its effect on a particularly sensitive or insensitive person or group." *Hamling v. United States*, 418 U.S. 87, 107 (1974).

By undermining that concern, the jury charge in this case was prejudically erroneous.

The court below also sustained the challenged instruction by giving consideration to the entire charge rather than isolated passages, citing *Boyd v. United States*, 271 U.S. 104, 107 (1926), in which this principle of review was formulated; *United States v. Hamling, supra*, and *United States v. Moore*, 522 F.2d 1068, 1079 (9th Cir. 1975), *cert. denied*, 423 U.S. 1049 (1976). In *Hamling*, however, the Court made clear that the objection to the trial court's instruction that a national standard be applied did not "materially affect the deliberations of the jury", *Id.*, 418 U.S. at 108, because the substantive law on the application of community standards as opposed to the jurors' individual standards had been correctly given to the jury. *Id.*, 418 U.S. at 107.

In *United States v. Moore, supra*, a proffered jury instruction was refused by the trial court. The Court of Appeals found that the substance of the requested instruction was communicated to the jury in the balance of the charge. The deficiencies in the trial court's charge here, unlike *Moore*, are neither consistent with the substantive law which the court should have charged, nor are they in the nature of omissions, the substance of which could be said to appear elsewhere. Rather, the deficiencies in the charge here complained of improperly and affirmatively misinstructed the jury on the law it was to apply. Upon consideration of the practical effect of the Court's instruction upon the jury, its mischief is apparent. Any conscientious juror instructed to give *some* weight to the effect of the material in issue upon children and other sensitive persons in the community, is likely to give *greater*

weight than the First Amendment permits to protecting the community's more susceptible citizens from offensive literature. Thus does the First Amendment erode.

The critical importance of proper jury instructions in obscenity prosecutions was recently noted by this Court in *Smith v. United States*, ... U.S. ....., 45 U.S.L.W. 4495 (1977). Justice Blackmun there stated:

> ". . . obscenity is to be judged according to the average person in the community, rather than the most prudish or the most tolerant. *Hamling v. United States, supra*; *Miller v. California, supra*; *Roth v. United States*, 354 U.S. 476 (1957). *Both of these substantive limitations are passed on to the jury in the form of instructions.*" *Id.*, ... U.S. at ..... 45 U.S.L.W. at 4498. (Emphasis added).

The trial court's jury instruction in the instant case failed to communicate properly "substantive limitations" by which the jury was constitutionally governed in determining the obscenity of the materials before it. The error in the instruction was prejudicial.

II. THE TRIAL COURT'S ERROR IN REFUSING TO ADMIT PROPER COMPARABLE EVIDENCE OFFERED AS PROOF OF COMMUNITY STANDARDS WAS COMPOUNDED BY THE ERROR OF THE COURT OF APPEALS IN REFUSING TO REVIEW SUCH ISSUE BECAUSE OF ITS RELIANCE UPON THE CONCURRENT SENTENCE DOCTRINE.

At the trial of this case, the petitioner sought to introduce two films in support of his contention that the materials for which he was being prosecuted did not violate local community standards. As a foundation for this evi-

dence, the petitioner called Whitney Williams, a representative of *Daily Variety*, who testified with respect to the widespread popular acceptance of these two films and their financial success. Despite this testimony, the trial judge refused to allow the jury to see these films.

On appeal, the court below stated that although the trial court did not articulate its reason for exclusion of these films, 551 F.2d at 1160, the appellate court found that the films were sufficiently similar to the film in issue, and that the offered films for that reason would have been admissible as comparison evidence, assuming the defense had proved community acceptance, 551 F.2d at 1161. That court declined, however, to review this issue, basing its refusal on the concurrent sentence doctrine, because the court in any event had determined that the offered films were not comparable to the other materials as to which it had concluded petitioner was validly convicted, and upon which concurrent sentences were imposed.

A. The Court of Appeals Erred in Its Application of the Concurrent Sentence Doctrine.

The concurrent sentence doctrine, as it has evolved from English common law, has been applied by reviewing courts in criminal cases where review is sought of several convictions, sentences have been imposed concurrently, and at least one conviction has been found valid. In such situations, courts, under certain circumstances, have refused to consider arguments relating to the remaining counts. This doctrine reached full development in this Court's decision in *Hirabayashi v. United States*, 320 U.S. 81 (1943). *See* Note, *The Federal Concurrent Sentence Doctrine*, 70 COLUMBIA L. REV. 1099 (1970). In 1969, however, this Court's decision in *Benton v. Maryland*, 395

U.S. 784 (1969), questioned the "haphazard" use of the doctrine and severely limited its application.

In the instant case, the Court of Appeals applied the doctrine as follows:

> "This circuit has adopted the concurrent sentence doctrine which, as enunciated by the Supreme Court in *Benton v. Maryland*, 395 U.S. 784, 791 (1969), is that a federal appellate court, as a matter of discretion, may decide that it is unnecessary to consider argument advanced by an appellant with regard to his conviction under one or more counts of an indictment, if he was at the same time validly convicted of other offenses under other counts and concurrent sentences were imposed." 551 F. 2d at 1161.

This application of the doctrine completely misinterprets this court's explication in *Benton v. Maryland, supra*. In *Benton*, the Court criticized the use of the concurrent sentence doctrine in previous cases both for its "haphazard" use in some instances and its automatic application in others. *Id.*, at 789. The decision then emphasized that although the rationale of the doctrine is unclear, it cannot be used as a jurisdictional bar.

> "One can search through these cases, and related ones, without finding any satisfactory explanation for the concurrent sentence doctrine . . . But whatever the underlying justifications for the doctrine, *it seems clear to us that it cannot be taken to state a jurisdictional rule.* Moreover, whatever may have been the approach in the past, our recent decisions on the question of mootness in criminal cases make it perfectly clear that the existence of concurrent sentences does not remove the elements necessary to create a justiciable case or controversy." *Id.*, at 789-790. (Emphasis supplied).

The doctrine was thus severely limited to cases in which there is no possibility of adverse collateral consequences resulting from a failure to reverse one count of a conviction.

> "In *Sibron v. New York*, 392 U.S. 40, 88 S.Ct. 1889, 20 L.Ed. 2d 917 (1968), we held that a criminal case did not become moot upon the expiration of the sentence imposed. We noted 'the obvious fact of life that most criminal convictions do in fact entail adverse collateral legal consequences.' Id., at 55. We concluded that the mere possibility of such collateral consequences was enough to give the case the 'impact of actuality' which was necessary to make it a justiciable case or controversy. *Sibron* and a number of other recent cases have canvassed the possible adverse collateral effects of criminal convictions, and we need not repeat that analysis here. It is enough to say that there are such possibilities in this case. For example, there are a few States which consider all prior felony convictions for the purpose of enhancing sentence under habitual criminal statutes, even if the convictions actually constituted only separate counts in a single indictment tried on the same day. Petitioner might some day in one of these States have both his larceny and burglary convictions counted against him. Although this possibility may well be a remote one, it is enough to give this case an adversary case and make it justiciable. Moreover, as in *Sibron*, both of petitioner's convictions might someday be used to impeach his character if put in issue at a future trial. Although petitioner could explain that both convictions arose out of the same transaction, a jury might not be able to appreciate this subtlety." *Id.*, at 790. (Footnotes omitted).

The Court thus refused to apply the doctrine and proceeded to review the constitutional claims urged by the petitioner, despite the fact that the possibilities of adverse consequences to Benton were slight in view of his four prior felony convictions spanning thirty years. *See* Note, *The Federal Concurrent Sentence Doctrine*, *supra*, at 1107, fn. 56. Later references to the *Benton* decision in this Court, without delineating its reasons, have reached inconsistent results.

See *Barnes v. United States*, 412 U.S. 837, 849, fn. 16 (1973), in which the doctrine was applied and *Andresen v. Maryland*, ... U.S. ....., 96 S. Ct. 2737, 2743, fn. 4 (1976), in which it was not.

In *United States v. Maze*, 414 U.S. 395 (1974), this Court again emphasized the limited application of the rule when balanced against the defendant's interest in having a conviction reversed.

> "The Court of Appeals determined that even though it affirmed respondent's Dyer Act conviction, for which he had received a concurrent five-year sentence, it should also consider the mail fraud convictions as well. There is no jurisdictional barrier to such a decision, *Benton v. Maryland*, 395 U.S. 784, 89 S.Ct. 2056, 23 L.Ed. 2d 707 (1969), and the court decided that 'no considerations of judicial economy or efficiency have been urged to us that would outweigh the interest of appellant in the opportunity to clear his record of a conviction of a federal felony.' 468 F. 2d at 536, n. 6. We agree that resolution of the mail fraud questions presented by this case is appropriate." *Id.*, at 398, fn. 1.

Circuit Courts of Appeal other than the Ninth Circuit have cautiously limited the use of the doctrine to cases

in which no adverse consequences are apparent. In *United States v. Tanner*, 471 F.2d 128 (7th Cir. 1972), *cert. den.*, 409 U.S. 949 (1972), for example, it was stated:

> ". . . [T]he Supreme Court's decision in *Benton v. Maryland*, 395 U.S. 784, 791 89 S.Ct. 2056, 23 L.Ed. 2d 707 (1969), constitutes a reevaluation of the 'concurrent sentencing doctrine.' *Benton* holds that there is no jurisdictional bar (stemming from the requirement of justiciability) to a consideration of all counts under concurrent sentences. The Court points out that an unreviewed count could increase an appellant's future sentencing under an habitual offender statute, or adversely affect his chances for parole, or be used to impeach his testimony at a future trial. *Benton* suggests that review is desirable where adverse collateral consequences of this nature may flow from conviction. . . Since we cannot say that there is no possibility of undesirable collateral consequences attendant upon these convictions, we choose to consider the validity of all the challenged counts." *Id.*, at 140.

Accord, *Crovedi v. United States*, 517 F.2d 541 (7th Cir. 1975); *United States v. McLeod*, 493 F.2d 1186 (7th Cir. 1974); and *United States v. Febre*, 425 F.2d 107 (2nd Cir. 1970), *cert. den.*, 400 U.S. 849 (1971).

This position is also espoused by the Eighth Circuit in cases such as the instant case, where crimes are serious. *United States v. Belt*, 516 F.2d 873, 876 (8th Cir. 1975), *cert. den.*, 423 U.S. 1056 (1976); See also *Sanders v. U. S.*, 541 F.2d 190 (8th Cir. 1976), *cert. den.*, ... U.S. ..... (1977); *cf. U. S. v. Darnell*, 545 F.2d 595 (8th Cir. 1976), *cert. den.*, 429 U.S. 1104 (1977).

In *Ethridge v. United States*, 494 F.2d 351 (6th Cir. 1974), *cert. den.*, 419 U.S. 1025 (1977), the Court applied the doctrine, but Judge McCree's concurring opinion in that case clearly indicates that appellant had made no claim of adverse consequences.

> "I concur because appellant makes no claim that adverse collateral effects may result from the sentences that he challenges here. I do not agree, however, that there exist no circumstances under which possible adverse consequences might be demonstrated." *Id.* at 352. (McCree, Circuit Judge, concurring).

This cautious approach to the use of the doctrine which was advised in *Benton* and which has been followed by other reviewing courts has been ignored by decisions of the Ninth Circuit which have invoked the doctrine routinely and without explanation of the motivating criteria. See, e.g., *United States v. Moore*, 452 F.2d 576 (9th Cir. 1971); *United States v. Hendricks*, 456 F.2d 167, 179 (9th Cir. 1972); *United States v. Ketola*, 455 F.2d 83 (9th Cir. 1972), *cert. den.*, 414 U.S. 847 (1973); and *United States v. Paduano*, 549 F.2d 145 (9th Cir. 1977). The variety between circuits in application of the rule should be clarified by this Court. Petitioner urges that, in light of *Benton* and of the entire panoply of adverse collateral consequences inherent in any criminal case, the rule should be abolished. No interests of judicial economy can possibly outweigh a defendant's interest in having even one felony conviction reversed. See *United States v. Maze, supra.*

In the instant case, the application of the concurrent sentence doctrine was particularly unfair. The collateral effects of possible use for impeachment purposes and increased sentencing for possible subsequent convictions are inherent in any criminal conviction. In addition, it is

quite possible that the jury convicting the defendant on all counts did not keep clearly in mind the nice distinctions between the materials shown to them under each separate count. There is a significant possibility that if the films offered had persuaded the jury that the film in question was not obscene, it would have been less likely to convict on the other counts involving the printed materials.

Also, because the printed material consisted mainly of advertisements, the jury could easily have been influenced by the offered films as evidence of the content of the type of product advertised in the brochures.

Finally, the length of the concurrent sentences imposed by the trial judge might very well have been determined by the fact that the defendant was found guilty on all counts. *Cf. United States v. Yates*, 355 U.S. 66 (1957) (remand for resentencing ordered where conviction on one of a number of counts was affirmed).

In order that a defendant's constitutional rights be preserved, it is urged that this Court abolish the concurrent sentence doctrine or, in the alternative, that the prejudice of collateral adverse effects of a criminal conviction be presumed unless a contrary showing is made by the government. *See* Note, *The Federal Concurrent Sentence Doctrine, supra,* at 1111. A defendant's ability to vindicate his constitutionally guaranteed rights cannot depend on the unguided exercise of discretionary powers by the separate Courts of Appeal.

The court below restricted its review of the trial court's refusal to admit the offered films solely to the film charged in Count 9 of the indictment, stating that the other materials "were of a different medium." *Id.*, 551 F.2d at 1155. Although the other materials were still pictures rather than motion picture film, they nonetheless in large measure

constituted photographs which depicted the same explicit sexual conduct which appeared in the series of photographs which comprised the films. If, as this court has observed, there is no distinction "as to the medium of expression", *Kaplan v. California*, 413 U.S. 115, 119 (1973), in determining whether a particular form of expression is obscene, it must follow that comparable material contained in the films should have been made available to the jury when it considered the other graphic depictions of sexual acts depicted in the still photographs in the other counts. Review of the trial court's refusal to admit the films, therefore, should not have been limited solely to the one count in the indictment pertaining to a film. The offered evidence was relevant as well to the other ten charges involving printed material.

The constitutional due process right of petitioner to present relevant evidence in his defense has been clearly recognized. *Smith v. California*, 361 U.S. 147, 165 (1959) (Justice Frankfurter, concurring), 171 (Justice Harlan concurring in part and dissenting in part) (see discussion, *infra*, pp. 33-36). The error resulting from the refusal to admit the offered films, therefore, should have been considered quite apart from the concurrent sentence doctrine. Such independent examination was required to determine whether, notwithstanding that the films were erroneously refused as to the film count, the refusal also constituted error as to the remaining counts. Under such circumstance, the reviewing court was required to determine not only whether the refusal to admit the offered films might have "contributed to the conviction", *Fahy v. Connecticut*, 375 U.S. 85, 86-87 (1963), but also whether the prosecution had established "beyond a reasonable doubt", that such failure to admit the films was not prejudicial to the petitioner, *Chapman v. California*, 386 U.S.

18, 24 (1967). No such showing has been made by the Government, and for good reason: no such showing is possible upon the record below.

The comparison films which the trial court refused to admit into evidence depicted explicit sexual activity of the same kind, variety, frequency and vividness as that contained in the charged material here in issue. If, after proof of widespread acceptance of such films in the community, the trial court had permitted the jury to view these comparison films, with the consequent defense summation and jury charges that would flow from such vigorous defense evidence, a more effective defense in an obscenity prosecution can scarcely be imagined. There can be little doubt that a powerful showing of community acceptance of the similar charged materials would have been made which *might* have affected the jury's verdict on *all* of the counts, and that is all that the *Fahy-Chapman* rule requires in order to insure reversal for constitutional error at the trial.

B. The District Court Erred in Excluding the Comparison Evidence.

If the Court of Appeals below had not been deterred by the concurrent sentence doctrine from its review of the comparable films offered by the petitioner, it is here contended that it should have found reversible error in the failure of the trial court to admit them into evidence.

The importance of comparison evidence in the trial of a case involving allegedly obscene materials has long been recognized. Such evidence is often offered to demonstrate levels of community standards or tolerance; its rejection for such a purpose constitutes a denial of due process:

". . . I agree with my Brother Frankfurter that the trier of an obscenity case must take into account 'contemporary community standards,' *Roth v. United States*, 354 U.S. 476, 489, 77 S.Ct. 1304, 1311, 1 L.Ed. 2d 1498. This means that, regardless of the elements of the offense under state law, the Fourteenth Amendment does not permit a conviction such as was obtained here unless the work complained of is found substantially to exceed the limits of candor set by contemporary community standards. The commuinty cannot, where liberty of speech and press are at issue, condemn that which it generally tolerates. This being so, it follows that due process—'using that term in its primary sense of an opportunity to be heard and to defend [a] substantive right,' (citation omitted) —requires a State to allow a litigant in some manner to introduce proof on this score. While a State is not debarred from regarding the trier of fact as the embodiment of community standards, competent to judge a challenged work against those standards, it is not privileged to rebuff *all* efforts to enlighten or persuade the trier." *Smith v. California*, 361 U.S. 147, 171 (1959). (Justice Harlan concurring in part and dissenting in part) (footnotes omitted).

This Court in *Hamling v. United States*, 418 U.S. 87, 125 (1974), reaffirmed its position that a ". . . defendant in an obscenity prosecution, just as a defendant in any other prosecution, is entitled to an opportunity to adduce relevant competent evidence bearing on the issues to be tried." That decision held, however, that in the particular case before it, such evidence was properly excluded because: (1) a "deluge" of material was offered (*Id.*, at 135); and (2) defendant's claim that it was accepted by the community was based upon proof that these materials were available for purchase, that some had received second-class mailing privileges, and that others had been judged non-obscene in prior adjudications. These facts were held insufficient to establish community acceptance. *Id.*, at 125-126.

The situation in the instant case is quite different. Here, it was demonstrated by a witness who was permitted to testify by the District Court that the two films offered were box office successes, rated first and third on the list of the ten most financially successful films of the year in Los Angeles. More than one-half million people in Los Angeles saw "Deep Throat" and more then 240,000 saw "The Devil in Miss Jones", paying an admission price of five dollars per person. It is difficult to imagine a stronger showing of widespread acceptance within the community. Despite the laying of this foundation, however, the trial judge refused to allow the jury to see the films themselves, thus leaving the defense witness's testimony floating in a vacuum, depriving the jury of any concrete evidence of the character of the material, and permitting the jury to speculate as to the actual content, for comparable purposes, of the films whose broad community acceptance had been undisputedly demonstrated. This clearly was error. The jury should have been permitted to view and compare the explicit sexual depictions in the offered films with the depictions contained in the prosecution's exhibits.

That the introduction of the offered films was critical to give full meaning to the testimonial evidence concerning their community acceptance is borne out by Chief Justice Burger's recognition in *Paris Adult Theater I v. Slaton*, 413 U.S. 49, 56 (1973), that "[t]he films, obviously, are the best evidence of what they represent." These films, whose similarity to the film in issue was acknowl-

edged by the court below and whose community acceptance was proved, thus constituted the best evidence that the petitioner had to present to the jury to support his plea of "not guilty". These films were in a sense "expert testimony" which the petitioner had a right to present as a matter of due process of law. As stated by Justice Frankfurter, concurring in *Smith v. California, supra*:

> "Therefore, to exclude such expert testimony is in effect to exclude as irrelevant *evidence that goes to the very essence of the defense* and therefore to the constitutional safeguards of due process." *Id.*, 361 U.S. at 165. (Frankfurter, J., concurring). (Emphasis supplied).

Although the District Court gave no specific reason for its exclusion of these films, the Court of Appeals ruled that they were sufficiently similar to the films at issue here that they met one criteria of the test for admissibility. This test has been established to be twofold. The foundation required must demonstrate, *first*, that the materials offered be similar to the materials at issue and, *second*, that the offered materials enjoy a "reasonable degree of community acceptance." *Womack v. United States*, 294 F.2d 204 (D.C. Cir. 1961), *cert. den.*, 365 U.S. 859 (1961); *United States v. Womack*, 509 F.2d 368, 376 (D.C. Cir. 1972), *cert. den.*, 422 U.S. 1022 (1975); *United States v. Jacobs*, 433 F.2d 932, 933 (9th Cir. 1970). Where, as in the instant case, the court below has ruled favorably on the issue of similarity and the petitioner demonstrated overwhelming community acceptance, error on the part of the District Court in refusing admission of the films is conclusively demonstrated.

The importance of allowing the defense in an obscenity prosecution to introduce proper comparison evidence has

been discussed by a number of state courts. In *Yudkin v. State*, 229 Md. 223, 182 A.2d 798 (1962), the Court reviewed evidence offered as comparable to the novel, THE TROPIC OF CANCER.

> ". . . And because the trier of the facts is required under the *Roth* obscenity test to apply 'contemporary community standards' in determining what is and what is not obscene, [as it is under the *Miller* test], it is essential that the jury or court, instead of being required to depend on what may well be a limited knowledge of the moral and literary standards of the community, has a right to read, or to be informed of, the contents of comparable books that have been generally accepted or tolerated by the public." *Id.*, at 802. (Bracketed material supplied).

Exclusion of such evidence has been held to be reversible error:

> "Accordingly, we are required to hold that it is error for a trial court to deny, or unreasonably curtail a defendant's right in an obscenity case to introduce into evidence otherwise competent and non-repetitive testimony or exhibits which directly relate to or bear upon the absence of any or all of the elements of the *Miller* obscenity test. To hold otherwise would, so it seems to us, authorize the entirely impermissible situation where a court, sitting as here, in equity without the benefit of a fact-finding jury and not required to empanel an advisory jury, would become the sole arbiter unassisted by and uninstructed through the testimony of competent witnesses, of those community standards which are essential to the definition of what is, or is not, prurient and patently offensive and therefore obscene, and thereby deny to the de-

fendant in the cause the opportunity required by due process of law to present evidence favorable to his position." *State ex rel. Leis v. William S. Barton Co., Inc.*, 45 Ohio App. 2d 249, 344 N.E. 2d 342, 351 (1975).

Accord, *In re Harris*, 16 Cal. Rptr. 889, 366 P.2d 305 (1961); *Pierce v. State*, 296 So. 2d 218 (S. Ct. Ala. 1974), *cert. den.*, 419 U.S. 1130 (1975); and *Woodruff v. State*, 11 Md. App. 202, 273 A.2d 436 (1971).

The exclusion of comparison evidence in this case was arbitrary and unsupported by any proper ground. This Court should reaffirm the constitutional right of a defendant in an obscenity prosecution to offer relevant comparison evidence.

Moreover, in the exercise of its supervisory powers, this Court should find that it was an abuse of discretion for the trial court to have refused the offered comparables where the similarity of the material to the material charged was clear and so found by the court below, community acceptance of the offered evidence was clearly and without dispute proved at the trial level, and the trial court failed to allow the jury to view the films after the foundation for the admission of the material was permitted at the trial to demonstrate that the two films had received broad community acceptance in the Los Angeles area.

III. A JURY SHOULD NOT BE CHARGED TO DETERMINE THE OBSCENITY OF MATERIAL UPON CONSIDERATION OF ITS APPEAL TO DEVIANT SEXUAL GROUPS IN THE ABSENCE OF SUFFICIENT EVIDENCE DEMONSTRATING APPEAL AND DISSEMINATION TO SUCH GROUPS.

The trial court charged the jury:

"The first test to be applied in determining whether a given picture is obscene, is whether the predominant theme or purpose of the picture, when viewed as a whole and not part by part, and *when considered in relation to the intended and probable recipients, is an appeal to* the prurient interest of the average person of the community as a whole or *the prurient interest of members of a deviant sexual group* at the time of mailing. (App. 56-57). (Emphasis supplied).

* * * * *

"In applying this test, the question involved is not how the picture now impresses the individual juror, but rather, *considering the intended and probable recipients,* how the *picture would have impressed* the average person, or *a member of a deviant sexual group* at the time they received the picture." (App. 57). (Emphasis supplied).

Petitioner objected to those parts of the foregoing charge which permitted the jury to consider the effect of the material on members of sexually deviant groups (R.T. 630) on the ground that sufficient evidence on the elements of appeal to prurient interest of sexually deviant groups had not been presented by the prosecution. The trial court's overruling of petitioner's objection was approved by the court below, which held upon the authority

of *Mishkin v. New York,* 383 U.S. 501 (1966), that evidence of design and dissemination, as well as evidence which clearly defines the group was not a prerequisite to the charge, that in any event sufficient evidence on the question was presented through the prosecution's rebuttal witness, and that the deviant appeal charge was similar to that approved by this court in *Hamling v. United States, supra,* 418 U.S. at 129 (1974), for which reasons the charge was approved. *United States v. Pinkus, supra,* 551 F.2d at 1158-59.

In *Mishkin v. New York, supra,* this Court carefully detailed not only the content of the fifty books involved in the case, but also recounted the evidence presented at trial as to their cost of production, sales price, massive number, and even the detailed instructions given by the defendant to the authors of the publications with respect to the deviant sexual practices he wanted portrayed in the books. It was in light of the extensive record of evidence that clearly established that the material was designed for and intended to be disseminated to members of a deviant sexual group that this Court determined that a charge as to material directed to deviants was permissible. The Court stated:

> "Where the material is *designed for and primarily disseminated* to a *clearly defined* deviant sexual group, rather than the public at large, the prurient-appeal requirement of the *Roth* test is satisfied if the dominant theme of the material taken as a whole appeals to the prurient interest in sex of the members of that group. The reference to the 'average' or 'normal' person in *Roth,* 354 U.S. at 489-490, 77 S.Ct. at 1311, does not foreclose this holding. In regard to the prurient-appeal requirement, the concept of the 'average' or 'normal' person was employed in *Roth* to serve the

> essentially negative purpose of expressing our rejection of that aspect of the *Hicklin* test, *Regina v. Hicklin* (1868), L.R. 3 Q.B. 360, that made the impact on the most susceptible person determinative. *We adjust the prurient-appeal requirement to social realities by permitting the appeal of this type of material to be assessed in terms of the sexual interests of its intended and probable recipient group;* and since our holding requires that the recipient group be defined with more specificity than in terms of sexually immature persons, it also avoids the inadequacy of the most-susceptible-person facet of the *Hicklin* test". *Id.,* 383 U.S. at 508-509. (Emphasis supplied).

A comparison of the evidence of appeal to deviant groups appearing in the record in the case at bar and that presented in *Mishkin* and *Hamling,* compels the conclusion that in the instant case the prosecution never intended to establish an evidentiary basis for the charge on appeal to deviant groups. First, no evidence on the issue was presented by the prosecution in its case-in-chief. Only in rebuttal did the prosecution produce a witness who did not define or describe the groups but, in the words of the court below, merely testified that the materials appealed to "the prurient interest of homosexuals, sado-masochists and those interested in group sex." *Id.,* at 1158-1159, n. 7. The witness also testified that the same material had prurient appeal to both average and deviant persons. (App. 41).

Second, no evidence whatever was offered to show that the materials were designed for or disseminated to any deviant group, whether defined or not. Nor was the jury instructed that it was required to find that petitioner had caused the materials to be designed for such deviant groups before it applied the test of prurient appeal. There

was also no instruction that the jury find that the deviant groups had been clearly defined by the evidence.

In *Hamling v. United States, supra,* contrary to the statement of the court below as to the non-existence of evidence on specific deviant appeal, there was indeed substantial evidence, including expert testimony, as to deviant appeal, and massive distribution of the materials, which permitted an inference to be drawn as to design and distribution to an "intended and probable recipient group." *Mishkin v. New York,* 383 U.S. 502, quoted in *Hamling v. United States,* 418 U.S. at 129. Moreover, this Court itself concluded that there was sufficient evidence in *Hamling* to support the charge on appeal to prurient interest of deviant groups. The conclusion of the court below that *Hamling* can be read as dispensing with the necessity of evidence on prurient appeal simply belies both the record and the statements of this Court in that case.

The court below also relied on *United States v. Hill,* 500 F.2d 733 (5th Cir. 1974), *cert. denied,* 420 U.S. 952 (1975). The court's reliance on *Hill* was misplaced. The only issue in *Hill* was whether the charged material, which apparently exhibited deviant conduct, required the prosecution to introduce expert testimony to make a *prima facie* case, an issue entirely divorced from that which this case presents: whether the prosecution was entitled to a charge on prurient appeal to deviant groups. Although the Court of Appeals in *Hill* stated that expert testimony was not required where deviant sexual conduct was portrayed in the exhibits which were received in evidence, the court's opinion does not reveal whether the trial court charged the jury on appeal to deviant groups; if it did so, no issue as to such charge was presented to the appellate court.

In a footnote to its opinion,[6] the court below conceded that there was "some support" for petitioner's contention that an evidentiary foundation was required to support a charge on prurient appeal to deviant groups. In *Paris Adult Theater I v. Slaton,* 413 U.S. 49 (1973), after concluding that expert testimony as to the obscenity of the materials was not required if the materials are placed in evidence, Chief Justice Burger stated, in a footnote:

> "We reserve judgment, however, on the extreme case, not presented here, where contested materials are directed at such a bizarre deviant group that the experience of the trier of fact would be plainly inadequate to judge whether the material appeals to the prurient interest. See *Mishkin v. New York,* 383 U.S. 502, 508-510 (1966); *United States v. Klaw,* 350 F. 2d 155, 167-168 (C.A. 2d 1965)." *Id.,* 413 U.S. at 56, fn. 6.

In *Mishkin,* this Court emphasized the evidentiary basis for implementation, by instruction to the jury, of the rule there decided. The Court stated, "Not only was there proof of the books' prurient appeal . . . but the proof was compelling." *Id.,* 383 U.S. at 510. This was in sharp contrast to the record in *United States v. Klaw,* 350 F.2d 155 (1965), in which Judge Moore found no such proof after searching the record. Judge Moore observed that where the material in issue is purportedly directed toward members of a deviant group, the necessity for evidence showing the existence of prurient appeal to such group is even more critical:

> "*[I]f proof of prurient stimulation and response is generally important, it is particularly necessary when [the] prurient interest may be that of a deviant segment*

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6. *United States v. Pinkus,* 551 F.2d at 1158-1159 fn. 7.

of society whose reactions are hardly a matter of common knowledge. It may well be that there are characters and cults to which exaggerated high heels, black patent leather bindings and bondage poses have some occult significance, but we doubt that any court would take judicial notice of the reaction that deviates —or the average man—might have to such stimuli. However, some proof should be offered to demonstrate such appeal, thereby supplying the fact-finders with knowledge of what appeals to prurient interest so that they have some basis for their conclusion." *Id.*, 350 F.2d at 166. (Emphasis supplied).

The court in *Klaw* thus concluded:

"In this case, the jury had insufficient evidence even to 'recognize' that the material appealed to the prurient interest of the average person. *It had absolutely no evidentiary basis from which to 'recognize' any appeal to the prurient interest of the deviate or the typical recipient—a class never really defined in the record.* Because there was insufficient evidence for the jury to consider Nutrix material 'obscene' under any proper view of the Roth test, the motion for directed verdict of acquittal should have been granted." *Id.*, at 167-168. (Footnote omitted, emphasis supplied).

Petitioner therefore urges the Court to determine that where the record fails to contain evidence which demonstrates that the material in issue was designed for and disseminated to a clearly defined sexually deviant group, and further fails to show that the material appealed to the prurient interest of the members of such deviant group, it was error for the trial court to have instructed the jury to determine the obscenity of the materials in issue by reference to its effect on such groups.

Petitioner further urges the Court to determine that in any event the charge on deviant appeal as given was insufficient by reason of the failure of the trial court to instruct the jury that prior to its consideration of effect of the materials on deviants it was first required to find that the materials had been designed for and primarily disseminated to a clearly defined sexual group.

IV. IN A FEDERAL OBSCENITY PROSECUTION WHERE THERE IS NO EVIDENCE OF PANDERING, IT IS ERROR TO CHARGE THE JURY ON PANDERING AND WHERE PANDERING IS CHARGED UNDER SUCH CIRCUMSTANCES, THE ERROR IS COMPOUNDED BY DIRECTING THE JURY TO CONSIDER FACTS NOT IN EVIDENCE.

The trial court also instructed the jury on pandering obscenity, as follows:

"Having covered the three elements of obscenity, there is one additional matter that you may consider, and that is the matter of pandering. You must make the decision whether the materials are obscene under the test I have given you. *In making this determination you are not limited to the materials themselves. In addition, you may consider the setting in which they are presented. Examples of what you may consider in this regard are such things as: manner of distribution, circumstances of production, sale and advertising. The editorial intent is also relevant. What you are determining here is whether the materials were produced and sold as stock in trade of the business of pandering. Pandering is the business of purveying textual or graphic matter openly advertised to appeal to erotic interest of the customer.*

"The question of obscenity is to be answered by application of the basic test recited earlier, but *if you find this to be a close case under that test, then you may consider the evidence of pandering to assist you in your decision.* Such evidence is pertinent to all three elements of the basic test of obscenity.

"*The circumstances of presentation and dissemination of material are especially relevant to a determination of whether the social importance claimed for the material is pretense or reality,* or whether it was the basis upon which it was traded in the marketplace or a spurious claim for litigation purposes. *Where the distributors' sole interest is on the sexually provocative aspects of the publications, that fact may be decisive in the determination of obscenity.*

"In summary, evidence of pandering simply is useful in applying the basic obscenity test where an exploitation of interest in titillation by pornography is shown with respect to the material lending itself to such exploitation through pervasive treatment or description of sexual matters. Such evidence may support the determination that the material is obscene, even though, in other context, the material would escape such condemnation." (App. 59-60). (Emphasis supplied).

The foregoing instruction, given over objection of petitioner (R.T. 644-651; 729-730; 735), presents two issues:[7]

7. Petitioner urges as a third issue, if the same is deemed to be included as a "subsidiary question" to the questions presented for review in the petition and not additional thereto (See, Supreme Court Rule 40.1(d) (1) and (2)), that a charge on pandering in general, and specifically as to statements of petitioner appearing in the brochures received in evidence, as well as the commercial aspects of the materials, is constitutionally

(Continued on following page)

First, whether an instruction on pandering is appropriate in the absence of any evidence of pandering to support the charge. *Second,* assuming some narrow basis for such charge, whether it was error to instruct the jury to consider specific matters relating to pandering about which there was no evidence whatever.

A. There Was Insufficient Evidence to Support Any Charge of Pandering.

The genesis of the consideration of pandering as an adjunct to the determination of obscenity was *Ginzburg v. United States,* 483 U.S. 463 (1966). In *Ginzburg,* this Court stated that "there was *abundant evidence* to show that each of the accused publications was originated or sold as stock in trade of the sordid business of pandering. . . ." *Id.,* 383 U.S. at 467 (Emphasis supplied). The evidence included testimony with regard to the mailing privileges and post office locations secured by the defendant, the substantial number of copies mailed (5500—of one of the publications), the editorial goals and practices of the defendant, described by one of defendant's former writers, *cf. Mishkin v. New York,* 383 U.S. 502 (1966), and "much additional evidence supporting the petitioner's pandering" *Ginzburg, supra,* 383 U.S. at 470, fn. 11, not recounted by the Court in its opinion. In *Mishkin v. New York, supra,* 383 U.S. at 505-506, this Court also detailed

Footnote continued—

impermissible in light of the Court's decision in *Virginia State Board of Pharmacy v. Virginia Consumer Council, Inc.,* 425 U.S. 748 (1976), in which commercial speech was found to be protected by the First Amendment. Petitioner urges as an alternate ground for reversal that the pandering charge should not have been given under any circumstance. *Ginzburg v. United States,* 383 U.S. 463 (1966), has, by implication, been overruled. See opinion of Justice Stevens, dissenting in *Splawn v. California,* ..... U.S. ....., 45 U.S.L.W. 4574, 4576-4577 (1977). "*Ginzburg* cannot survive *Virginia Pharmacy.*" *Id.,* at 4577.

the evidence showing defendant's methods of operation and instructions to his authors to support a charge that the material was conceived and marketed to specific groups, which evidence was relevant to the jury's consideration of the obscenity of the materials.

Likewise, in *Hamling v. United States*, 418 U.S. 87 (1974), in which the pandering principle of *Ginzburg* was reaffirmed, *id.*, at 130, the record was shown to contain substantial testimonial evidence of the defendant's methods of operation and distribution of the materials in issue.

In the case before this Court, there was no evidence whatever presented at the trial of the kind detailed by the Court in *Ginzburg, Mishkin* or *Hamling*. The prosecution's case-in-chief was presented upon a stipulation that the material was mailed to certain identified recipients whose occupations were noted. The exhibits were offered and received in evidence and the jury viewed the film. Petitioner contends that with the paucity of evidence presented, the jury should not have been instructed or permitted to consider pandering of the material.

The court below found sufficient "information", 551 F.2d at 1160, in the stipulation and materials to support the charge on pandering. This conclusion was based on a finding that the materials were indiscriminately mailed and represented by petitioner as erotically arousing.

It is important to note that the prejudice resulting to the petitioner from the pandering charge cannot be determined by the language contained in the charge itself, or by rationalizing, as did the court below, that the jury was not expressly "instructed" to consider matters upon which there was no evidence. The effect of the pandering charge was far more sweeping. By allowing the

charge on pandering, the trial court gave the prosecutor a green light to argue the pandering issue to the jury. And whereas the record to that point was silent on the issue, the floodgates were opened and the prosecutor was thus permitted to comment on the pandering conduct of the petitioner.

The prosecutor discussed pandering at length and emphasized to the jury that "we have evidence showing . . . commercial exploitation" (R.T. 731). He addressed them extensively on "examples of widepread pandering of this material" (R.T. 733), and urged them to conclude as he had that "the material is so outrageously pandered". (R.T. 738) (See, generally, the prosecutorial comments on pandering, R.T. 731-38, 781-82).

Whatever evidence of pandering which may have appeared in the stipulation and the exhibits was so disproportionately augmented by the prosecutor's argument that the charge must be recognized as prejudicial. The prosecution here, too, has the burden of showing beyond a reasonable doubt that the pandering charge was not prejudicial to petitioner. *Chapman v. California*, 386 U.S. 18 (1967) and *Fahy v. Connecticut*, 375 U.S. 85 (1963). That burden cannot be met by the government, not only because the prosecution stressed pandering in its argument to the jury, but because the jury, by virtue of its request that the pandering charge be reread to it, clearly indicated that pandering was decisive to its deliberations.

Until the departure from its established practice by its ruling in the case at bar, the Ninth Circuit Court of Appeals had refused to affirm convictions in which the jury was charged on pandering without substantial evidence to support such charge. *United States v. Baranov*, 418 F.2d 1051, 1053 (9th Cir. 1969), and *Grant v. United States*, 380

F.2d 748 (9th Cir. 1967). The court below relied on its decision in *United States v. Pellegrino*, 467 F.2d 41 (9th Cir. 1972), in which an advertising brochure was held not to constitute pandering "as the term is used in *Ginzburg*", 467 F.2d at 46, to extrapolate a rule which would permit a charge on pandering by virtue of the content of the brochure itself and nothing more. *United States v. Pinkus, supra*, 551 F.2d at 1159-1160. The pandering principle conceived in *Ginzburg*, however, requires more substantial evidence as proof of pandering than just the material which forms the basis of the charge in the first instance.

If this Court determines that pandering is to be retained as a factor in the determination of obscenity,[8] petitioner urges the Court to hold that substantial evidence of pandering is a precondition to the injection of pandering as an issue in an obscenity prosecution, and that in the case before this Court the evidence was insufficient to warrant the trial court's charge.

B. The Charge on Pandering Invited the Jury to Consider Matters Not in Evidence.

Even if this Court were to conclude that the jury was entitled to consider the content of the brochures or advertisements under a pandering charge (which petitioner denies), the charge in this case went far beyond the specific content of the advertising materials offered in evidence at the trial.

The trial judge instructed the jurors that they could consider the "setting" in which the materials are presented, including "manner of distribution, circumstances of production, sale and advertising." (App. 60). There was

8. See footnote 7, *supra*.

no evidence whatever of the manner of distribution, sale or advertising of the materials other than the bald stipulation that they were mailed for the personal use of the recipient. And there was no evidence whatever concerning circumstances of production. Accordingly, this instruction invited the jury to consider matters not in evidence.

The court below approved the charge on the basis that the items enumerated by the trial judge were only examples, and that because the occupations of the recipients were known to the jurors, they could infer that distribution was not to a particular professional group. 551 F.2d at 1160. However, the occupations of the recipients could supply no inference whatever as to the circumstances of production, sale or advertising, nor any of the sort of detail concerning manner of distribution which has been present in other cases in which this Court has approved pandering charges.

The critical importance of the pandering instruction in this regard is unmistakably evident from the fact that the jury specifically asked for a re-reading of that instruction after it had retired to deliberate (App. 63-65). In fact, this request was the only question submitted by the jury during its deliberations. Thus, the objectionable language pertaining to pandering was repeated to the jury a second time, and received yet greater emphasis.

This Court has held that it is error to give even a correct charge on facts which are not in evidence.

> "It is clearly error in a court to charge a jury upon a supposed or conjectural state of facts, of which no evidence has been offered. The instruction presupposes that there is some evidence before the jury which they may think sufficient to establish the facts hypothetically assumed in the opinion of the court; and if

there is no evidence which they have a right to consider, then the charge does not aid them in coming to correct conclusions, but its tendency is to embarrass and mislead them. It may induce them to indulge in conjecture, instead of weighing the testimony." *United States v. Breitling*, 20 How. 252, 254-255, 61 U.S. 252, 254-255 (1858).

The lack of evidence on the specific matters upon which the trial judge invited the jurors to speculate is sufficient cause for reversal of petitioner's conviction.

CONCLUSION

This Court has made clear that obscene utterances, as distinguished from other forms of expression, are not protected by the First Amendment as a matter of substantive law, *Roth v. United States*, 354 U.S. 476 (1957); *Miller v. California*, 415 U.S. 15 (1973). But it has never suggested that because the content of a book or film may be shoddy, it is for that reason entitled only to a watered down version of the procedural protections which are guaranteed other more genteel forms of expression. For it is where the form of expression is most shocking, most offensive to the community at large, that procedural safeguards must be afforded in their most undiluted form in order to insure that community outrage will not be substituted for the "sensitive tools," *Speiser v. Randall*, 357 U.S. 513, 525 (1958), necessary to separate protected from unprotected expression. *Roaden v. Kentucky*, 413 U.S. 496 (1973); *Terminiello v. Chicago*, 337 U.S. 1 (1949); *Cohen v. California*, 403 U.S. 15 (1971).

This case is an unfortunate example of such procedural failure. The court below identified, but condoned,

the existence of numerous improprieties in the trial of this obscenity case. It disapproved of an instruction including children in the community for purposes of assessing community standards. 551 F.2d at 1158. It agreed that there was error in overruling the motion to strike inflammatory testimony of a Government witness. *Id.*, at 1161-1162. It conceded that permitting cross-examination of a defense witness on the effect of pornography on children might have been erroneous, *id.*, at 1160, and its threshold review of the exclusion of defense comparison evidence pointed toward error. *Id.*, at 1161. Notwithstanding these suggestions of error, as well as other unconceded errors detailed in this brief, the court below affirmed petitioner's conviction because "[t]he evidence of obscenity was . . . overwhelming . . . .", *Id.*, at 1160, and because it inferred that petitioner had commercially exploited the materials. *Id.*, at 1159-1160. The affirmance in this case exemplifies the dangerous judicial temptation to sustain a conviction in spite of irregularities of procedure whenever the court perceives that the defendant is a pornographer and the materials he distributes are obscene.

In the face of the unequivocal decisions of this Court, which insist "that regulation of obscenity scrupulously embody the most rigorous procedural safeguards," *Bantam Books v. Sullivan*, 372 U.S. 58, 66 (1963); *Smith v. California*, 361 U.S. 147 (1959), such judicial behavior is indefensible.

It remains for this Court, in the exercise of its federal supervisory power and as a matter of constitutional review, to delineate with some precision the procedures which are required in the trial of a federal obscenity case so that, under this Court's guidelines, appropriate form may protect First Amendment substance. This case, even in its tawdry setting, provides the opportunity to do so.

". . . the materials before us may be garbage. But so is much of what is said in political campaigns, in the daily press, on TV, or over the radio. By reason of the First Amendment—and solely because of it—speakers and publishers have not been threatened or subdued because their thoughts and ideas may be 'offensive' to some." *Miller v. California*, 413 U.S. 15, 44 (1973) (Douglas, J., dissenting).

Petitioner's conviction, as affirmed by the court below, should be reversed.

Respectfully submitted,

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APPENDIX

Title 18, United States Code, Section 1461

§ 1461. Mailing obscene or crime-inciting matter

Every obscene, lewd, lascivious, indecent, filthy or vile article, matter, thing, device, or substance; and—

Every article or thing designed, adapted, or intended for producing abortion, or for any indecent or immoral use; and

Every article, instrument, substance, drug, medicine, or thing which is advertised or described in a manner calculated to lead another to use or apply it for producing abortion, or for any indecent or immoral purpose; and

Every written or printed card, letter, circular, book, pamphlet, advertisement, or notice of any kind giving information, directly or indirectly, where, or how, or from whom, or by what means any of such mentioned matters, articles, or things may be obtained or made, or where or by whom any act or operation of any kind for the procuring or producing of abortion will be done or performed, or how or by what means abortion may be produced, whether sealed or unsealed; and

Every paper, writing, advertisement, or representation that any article, instrument, substance, drug, medicine, or thing may, or can, be used or applied for producing abortion, or for any indecent or immoral purpose; and

Every description calculated to induce or incite a person to so use or apply any such article, instrument, substance, drug, medicine, or thing—

Is declared to be nonmailable matter and shall not be conveyed in the mails or delivered from any post office or by any letter carrier.

Whoever knowingly uses the mails for the mailing, carriage in the mails, or delivery of anything declared by this section or section 3001(e) of title 39 to be nonmailable, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, or knowingly takes any such thing from the mails for the purpose of circulating or disposing thereof, or of aiding in the circulation or disposition thereof, shall be fined not more than $5,000 or imprisoned not more than five years, or both, for the first such offense, and shall be fined not more than $10,000 or imprisoned not more than ten years, or both, for each such offense thereafter.

The term "indecent", as used in this section includes matter of a character tending to incite arson, murder, or assassination. As amended Jan. 8, 1971, Pub.L. 91-662, §§ 3, 5(b), 6(3), 84 Stat. 1973, 1974.